89-1127

No. _____

In The

SUPREME COURT OF THE UNITED STATES

December Term, 1989

WILLIAM C. AUSTIN, Petitioner,

V

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William C. Austin
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William C. Austin
Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process clause of the Fifth Amendment equal protection of law was violated where a requirement of the Federal Employees' Compensation Act was the basis for fraud charges. Whether the Administrative Procedures Act was violated where the Department of Labor Office of Worker's Compensation Programs required a totally disabled person to file a report or affidavit of employment earning.

2. Whether the Federal Employees' Compensation Act provides a duty for the totally disabled person to file such a report and if Title 18 United States Code §1001 alone provides a duty under the Federal Employees' Compensation Act.

3. Whether the Secretary of Labor enacted a substantive rule that required notice for comment and rule making.

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NINTH CIRCUIT COURT OPINION

The opinion, WILLIAM C. AUSTIN vs. UNITED STATES OF AMERICA is not appropriate for publication, it is included in the Appendix (App. 1).

NINTH CIRCUIT COURT JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was entered on October 3, 1989. The Court of Appeals had jurisdiction of these proceedings by virtue of 18 U.S.C. §3772, Federal Rules of Appellate Procedure Rules 3 and 4(a) and 4(b), and 28 U.S.C. §1291.

The jurisdiction of the United States Supreme Court is invoked by virtue of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

Fifth Amendment to the United States constitution: "No person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution: "Section 1. all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No person shall be denied the equal protection of the laws."

STATEMENT OF THE CASE

On June 3, 1983, the Petitioner was charged under 18 U.S.C. §1001 with two counts of making false statements for failing to disclose on a form CA-1032 Report required by the Department of Labor/Office of Worker's Compensation Programs that he was self-employed and one count of mail fraud 18 U.S.C. §1341.

On November 3, 1983, Petitioner was found guilty on all three counts and was sentenced to two years imprisonment on each count to be served concurrently and he appealed. The Ninth Circuit Court of Appeals denied the appeal and ordered disposition be by memorandum forgoing publication.

On August 30, 1985, Petitioner filed a 28 U.S.C. 2255. On May 7, 1986, the District Court denied the motion and

resentenced Petitioner to the same sentence crediting Petitioner for time already served and he appealed. On April 7, 1987, the Appeals Court denied the appeal. See UNITED STATES vs. AUSTIN, 817 F.2d 1352 (9th Cir., 1987), this was the final decision of the Appeals Court entered May 13, 1987.

On May 12, 1988, Petitioner Pro Se filed a Rule 60(b)(2) and (3) of the Rules of Civil Procedure in the District Court, the Court denied the motion on all six points as being moot and not appropriate for 60(b) and he appealed. The appeals Court affirmed the District Court decision entered October 2, 1989, by memorandum and the disposition is not appropriate for publication, App. 1, and that the motion was untimely and Petitioner's argument in support of his Rule 60(b) motion to be lacking in merit.

The Court noted that it had previously rejected substantially the same argument advanced by Petitioner in a prior appeal, App. 1. And in light of its decision, the Court intimated no view on the propriety of bringing a Rule 60(b) motion to set aside a judgment which the Court had already affirmed, in App. 1.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS DECISION TO DENY PETITIONER'S RULE 60(b)(2) and (3) MOTION BECAUSE OF A SUBSTANTIVE RULE ENACTED BY THE SECRETARY OF LABOR THAT VIOLATED THE ADMINISTRATIVE PROCEDURE ACT IS UNCONSTITUTIONAL.

The opinion entered October 2, 1989, decided this case on the basis that the Courts had already affirmed the district court's decision in UNITED STATES v. AUSTIN,

817 F.2d 1352 (9th Cir. 1987). In light of this decision the court saw no reason to consider the Rule 60(b) motion to set aside a judgment that it had already affirmed, and Petitioner's motion was untimely and because the court had previously rejected the same arguments in a prior appeal.

This is a case based on the Federal Employees' Compensation Act, App. 8, and a requirement of this Act was the sole basis for the three count indictment against Petitioner in this case. The Federal Employees' Compensation Act is an administrative section of the law and is a noncriminal section of the law, Title 5, section 8101 et. seq.

It is respectfully submitted that the Secretary of Labor rule requiring the totally disabled person to file the Form CA-1032 Report does not have the force of law

or a rule, since it was not adopted in accordance with Administrative Procedures Act and is, therefore, invalid and void, W.C. v. BOWEN, 807 F.2d. 1504 (9th Cir. 1987). The rule is substantive and requires notice for comment and rule making.

See W.C. v. BOWEN, supra. The court held that: [1] In determining whether a rule is interpretive or substantive, two factors must be considered. The first factor is whether the rule modifies existing rights, law or policy. If the rule "affect[s] a change in existing law or policy," POWDERLY v. SCHWEIKER, 704 F.2d 1092 (9th Cir. 1983), or "affect[s] individual rights and obligations," CHRYSLER CORP. v. BROWN, 441 U.S. 281, 302, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), the rule is substantive. CUBANSKI v. HECKLER, 781 F.2d 1421, 1426 (9th Cir. 1986). If the rule is

only indicative of the agency's interpretation of existing law or policy, it is interpretive. ALCARAZ v. BLOCK, 694 F.2d 593, 611 (9th Cir. 1984), LOUISIANA-PACIFIC CORP. v. BLOCK, 594 F.2d 1205, 1210 (9th Cir. 1982).

[2] Second, the source of the rule must be considered. If it is promulgated pursuant to statutory direction or under statutory authority, it is a substantive rule. If the agency does not exercise delegated legislative power to promulgate the rule, it is interpretive.

Agency rules which violate the Administrative Procedures Act are void. Agency action taken under void rule has no legal effect.

The Secretary of Labor has delegated legislative power to promulgate the rules and regulations to carry out the provisions

of the Act. However, the Secretary enacted a substantive rule that violated the Administrative Procedure Act and that rule is void and is of no legal effect.

There is no evidence that the requirement for the totally disabled to file the report was ever published in the Federal Register and, therefore, the requirement is void on this ground also, BOWEN, supra.

The only way to see if the rule that the Secretary of Labor enacted is substantive is to review the Federal Employees' compensation Act, 5 U.S.C. §8105, is headed total disability and does not permit the Secretary to require total disabled people to file the Form CA-1032 Report. See UNITED STATES v. DOREY, 711 F.2d 127, (9th Cir. 1983), the court clearly held that: the plain language of §8105(a) applies to temporary total disability and

does not authorize the Secretary of Labor to require totally a disabled person to report his or her earnings from employment or self-employment.

When the Ninth Circuit Court of Appeals made that decision, that was the end of the matter because it was made clear that Congress, at that time had not authorized the Secretary of Labor to make such a demand on the totally disabled. However, 5 U.S.C. §8106(b), is headed partial disability and there is where the reporting requirement is and these two sections of the Compensation law were enacted on the same day. There is no duty under either sections 8105 or 8106 that would require this Petitioner as a totally disabled person to file the Form CA-1032 Report.

In order for a person to be charged with fraud under Title 18 U.S.C. §1001,

there has to be a proven duty for the person to disclose the facts at the time he was alleged to have concealed. See UNITED STATES v. IRWIN, 654 F.2d 671, 678 (10th Cir. 1981), the court held that: in a prosecution under §1001 it is "incumbent upon the government to prove that the person had the duty to disclose the material facts at the time he was alleged to have concealed them (citations omitted)."

Title 18 U.S.C. §1001 is described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon a nondisclosure, there can be no fraud absent a duty to speak, CHIARALLA v. UNITED STATES, 455 U.S. 222, 109 S.Ct. 1108, 63 L.Ed.2d. 348, 1118 (1980).

The Secretary of Labor requirement of the total disabled to file the Form CA-1032 Report touches on the threshold of

Separation of Powers Doctrine. The statutory basis defines the limits to which an administrative agency may regulate. The statute which is being administered may not be altered or added to by the exercise of an administrative power to make regulations thereunder, UNITED STATES v. VEREDE COPPER CO., 196 U.S. 207, 25 S.Ct. 422, 49 L.Ed. 449, UNITED STATES v. GEORGE, 228 U.S. 14, 33 S.Ct. 412, 57 L.Ed. 712.

It is self-evident that the Secretary of Labor either added a requirement to 5 U.S.C. §8105(a), or added a class of people to be subject to 5 U.S.C. §8106(b). Either action on the part of the Secretary of Labor altered or added to the statute being administered, in violation of the Separation of Powers Doctrine.

When an act violates more than one act, the prosecution has the discretion under

which section the Defendant should be prosecuted, UNITED STATES v. FERN, 696 F.2d 1274 (10th Cir. 1983), UNITED STATES v. BATCHELDER, 442 U.S. 114, 123-125, 99 S.Ct. 2198, 60 L.Ed.2d. 755 (1979).

The charge against Petitioner refers to a requirement of an administrative procedure, a noncriminal section of the law, and does not consider the source of the rule. The source of the rule is the second factor that must be considered, BOWEN, 1504.

One thing is very clear, the Federal Employees' Compensation Act was the basis for the charges against this Petitioner. It has not been proven that this Petitioner was required to file the report as alleged. In this respect §1001 as a catchall provision has been improperly applied.

BOWEN, and DOREY, supra are decisions made by the Ninth Circuit Court of Appeals.

In AUSTIN v. UNITED STATES, No. 88-2932 D.C. No 65-1055 DT, sit squarely within the firm of those decisions. The Ninth Circuit Court of Appeals has ruled against its own decisions in this instant case. Moreover, the Ninth Circuit has ruled against the Supreme Court, in CHIARELLA v. UNITED STATES, Supreme Court decision in 1980 and the Separation of Powers Doctrine. What is even more strange is that the Ninth Circuit has not given any meaning to Title 5 U.S.C. §8101 et seq., this is where the facts of a reporting requirement would or would not be. All this court or any other court would have to do is review this section of the law to verify if the reporting requirement exists.

It has yet to be shown that this Petitioner had a statutory duty to file the Form CA-1032 Report. Therefore, it cannot be said that this Petitioner has violated

Title 18 U.S.C. §1001. However, it is clear that the Secretary of Labor has violated the Administrative Procedures Act, Title 5 U.S.C. §§551(4), 553(b, c) and the Separation of Powers Doctrine, the Federal Employees' Compensation Act, Title 5 U.S.C. §8101 et seq., particularly, §8105(a) of the Act. In fairness, the Federal Employees' Compensation Statutes has to be given their respected place in this instant case since the indictment charges a violation through a requirement of this Act.

The Rule 60(b), might be untimely, but why should there be a clock on where the Petitioner is trying to show the court that it is unconstitutional to charge a person with committing crime, where no crime has been committed and that his due process of law as guaranteed by the Fifth Amendment to the United States Constitution has been

abridged. In other words, all of this Petitioner's constitutional rights and guarantees have been violated by the lack of showing a statutory duty to disclose the information demanded by the Secretary of Labor. And, if there was a crime committed, it was a nonpunishable crime.

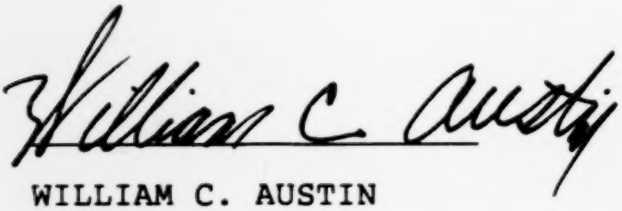
The Ninth Circuit Court of Appeals asserts (App. 1) that it may affirm the district court on any ground supported by the record. How can the appellate court affirm a matter that is of no legal effect? Where the rule used as the basis for the case violated the Administrative Procedures Act and is void and any actions taken under a void rule is invalid.

These are strange and unusual circumstances that have taken place surrounding this situation.

CONCLUSION

For each and all of the reasons presented in these arguments, Petitioner prays that this Court issue a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals entered in this case. However, Petitioner is a layman, and without the aid of qualified counsel, and is seeking justice the best he knows how. Therefore, Petitioner respectfully reminds the court of POLLARD v. UNITED STATES, 352 U.S. 354, 1 L.Ed.2d. 393, 77 S.Ct. 481, in that the U.S. Supreme Court does not impose on persons unlearned in the law the same high standards of the legal art that it might place on members of the legal profession. Petitioner, therefore, prays that this court will review the case on the merits of the facts presented.

Respectfully submitted,



WILLIAM C. AUSTIN

Petitioner Pro Se

APPENDIX

APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM C. AUSTIN,	)	
	)	
Petitioner-Appellant,	)	No. 88-2932
	)	
vs.	)	D.C. No.
	)	85-1055 DT
UNITED STATES OF AMERICA	)	MEMORANDUM*
	)	
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Hawaii
Dickran M. Tevrizian, District Judge,
Presiding

Submitted August 17, 1989**

Before: MERRILL, WRIGHT, AND BEEZER,

Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. 34(a) and Ninth Circuit Rule 34-4. Therefore, Austin's request for oral argument is denied.

William C. Austin appeals, pro se, the district court's decision which denied his motion, brought pursuant to Fed. R. Civ. P. 60(b)(2) and (3), seeking reversal of his convictions on two counts of making false statements, in violation of 18 U.S.C. §1001, and one count of mail fraud, in violation of 18 U.S.C. §1341, We affirm.

On May 13, 1986, the district court entered a judgment which partially denied Austin's motion, brought pursuant to 28 U.S.C. §2255, seeking the vacation of his convictions and sentences.[1/] On May 12, 1988, Austin filed a motion pursuant to Fed. R. Civ. P. 60(b)(2) and (3) seeking relief from the judgment which partially denied

1/ Upon Austin's appeal, this court affirmed the district court's partial denial of Austin's §2255 motion. United States v. Austin, 817 F.2d 1352 (9th Cir. 1987). Neither party has raised the matter, and in light of our decision here, we intimate no view on the propriety of bringing a Rule 60(b) motion to set aside a judgment which this court has already affirmed.

his §2255 motion. However, a motion for relief from a final judgment brought under subsections (b)(2) and (b)(3) of Rule 60 must be filed not more than one year after entry of the judgment to be set aside. Fed. R. Civ. P. 60(b); see Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981), cert. denied, 455 U.S. 942 (1982). Further, the taking of an appeal does not enlarge the one-year time limit. Corn v. Guam Coral Company, 318, F.2d 622, 629 n.13 (9th Cir. 1963). Therefore, even assuming without deciding that Austin properly could bring a Rule 60(b) motion to vacate the judgment in a §2255 proceeding,[2/] Austin's motion filed

2/ We note that in a case decided before the promulgation of the Rules Governing 2255 Cases;, 28 U.S.C. foll. 2255, we reversed and remanded where the district court had denied a criminal defendant's Fed. R. Civ. P. 60(b) motion to vacate an adverse judgment in a 2255 proceeding. See Winhoven v. United States, 201 F.2d 174, 174-75 (9th Cir. 1952)

more than a year after entry of the district court judgment was untimely. See Wood v. McEwen, 644 F.2d at 801.

In addition, we find Austin's arguments in support of his Rule 60(b) motion to be lacking in merit. We note that we have previously rejected substantially the same arguments advanced by Austin in a prior appeal. In these circumstances, the district court did not abuse its discretion in denying Austin's Rule 60(b) motion without a hearing.[3/] See Molloy v. Wilson, 878 F.2d 313, 315 (9th Cir. 1989).

AFFIRMED.

3/ We may affirm the district court on any ground supported by the record. United States v. County of Humboldt, California, 628 F.2d 549, 551 (9th Cir. 1980).

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WILLIAM C. AUSTIN,	) CASE NO. 85-1055 VAC
Petitioner,	) In re: U.S.A. v. AUSTIN
vs.	) CR-83-01222
UNITED STATES OF AMERICA	) MEMORANDUM OF DECISION
Respondent-Appellee.	)

MEMORANDUM OF DECISION

Petitioner, William C. Austin, has filed the instant petition pursuant to Rule 60(b)(2)(3) of the Federal Rules of Civil Procedure. In the instant petition, the petitioner is seeking an order (1) dismissing the three (3) count indictment filed in case number CR-83-01222; and (2) reversing the three (3) count jury convictions in case number CR-83-01222. Petitioner has raised six (6) specific

points in his present petition, all of which this court rejects as being moot and not appropriate pursuant to Federal Rules of Civil Procedure Rule 60(b)(2)(3).

On June 10, 1983, an indictment was returned charging petitioner with two counts of making a false statement in connection with worker's compensation programs (a violation of 18 U.S.C. §1001) and one count of mail fraud. On November 3, 1983, a jury found the petitioner guilty on all counts. The convictions and sentences were upheld on appeal to the Ninth Circuit on March 11, 1985 (No. 84-1050).

Thereafter, the petitioner filed a Rule 35 motion seeking an order correcting or reducing his sentence. The district court denied petitioner's motion and the Ninth Circuit on January 13, 1986, affirmed the district court (No. 85-1124).

Petitioner still dissatisfied with the result then filed a Section 2255 motion ;in the district court (Civ. No. 85-1055) alleging that (1) he did not have the opportunity to discuss his presentence report with counsel, (2) he was denied effective assistance of counsel in his prior trial and appeal, and (3) the indictment was faulty. After a hearing, the district court granted in part petitioner's Section 2255 motion, finding that he did not have an opportunity to discuss his presentence report with counsel, and the district court vacated its prior sentence. On June 9, 1986, petitioner was resentenced by the district court to two years, with credit given for time already served. On that same day, petitioner appealed both the partial denial of his Section 2255 motion, and the resentencing. The two cases were

consolidated for purposes of appeal by the Ninth Circuit (Nos. 86-1216 and 86-2395). Petitioner was released on parole on August 15, 1986.

On June 18, 1987, the Ninth Circuit in the consolidated cases on appeal (Nos. 86-1216 and 86-2395) affirmed the district court's resentencing of petitioner and partial denial of petitioner's Section 2255 motion. Once again, still dissatisfied, petitioner has filed the instant petition in the district court in civil case number 85-1055 seeking relief pursuant to Rule 60(b)(2)(3) of the Federal Rules of Civil Procedure.

Rule 60(b)(2)(3) of the Federal Rules of Civil Procedure provides in part as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding

> for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ...

The aforementioned rule applies to a civil action and not a criminal action. Even though petitioner has filed the instant petition in case number CIV 85-1055 pursuant to 28 U.S.C. 2255, the relief being sought by petitioner is moot and not appropriate pursuant to Rule 60(b)(2)(3) of the Federal Rules of Civil Procedure in that petitioner is collaterally attacking the full and final judgment in the underlying criminal action entitles U.S.A. v. AUSTIN, CR-83-01222. Specifically, the petitioner's convictions were upheld and affirmed on appeal to the Ninth Circuit on March 11, 1985 (No. 84-1050). In addition, on January 13, 1986,

the Ninth Circuit specifically addressed petitioner's challenge to the indictment in the said underlying criminal action (CR-83-01222). The Ninth Circuit (No. 85-1124) stated as follows:

> Austin failed to raise any contention prior to his conviction that he was improperly charged in the indictment with a violation of section 1001. He also failed to raise this issue in his prior appeal from the judgment of conviction....
>
> As noted above, Austin failed to challenge the sufficiency of the indictment prior to his conviction. Under Rule 12(b)(2) of the Federal Rules of Criminal Procedure "defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)" must be raised prior to trial. It is quite clear that the absence of subject matter jurisdiction can be raised at any time. See United States v. Arbo, 691 F.2d 862, 865 (9th Cir. 1982). In this matter, the district court had jurisdiction over the prosecution of Austin under section 1001, which is the general statute proscribing the filing of false statements, notwithstanding the enactment by

Congress of a specific statute making the filing of a false statement on a claim for compensation a misdemeanor. See United States v. Burnett, 505 F.2d 815, 816 (9th Cir. 1974) (prosecution under section 1001 proper although Congress had also enacted 18 U.S.C. 1919 which is a specific statute prohibiting false statements to obtain unemployment benefits), cert. denied, 420 U.S. 966 (1975). Austin does not contend otherwise. Any defect in the indictment in this matter was waived by the failure to raise it prior to trial.

For the reasons contained herein, this court denies petitioner's present petition on all points raised.

DATED: May 26, 1988.

DICKRAN TEVERIZIAN
UNITED STATES DISTRICT
COURT JUDGE

§8105. Total disability

(a) If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.

(b) The loss of use of both hands, both arms, both feet, or both legs, or the loss of sight of both eyes, is prima facie permanent total disability.

§8106. Partial disability

(a) If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.

(b) The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. An employee who -

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings;

forfeits his right to compensation with respect to any period for which the

affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 129 of this title, unless recovery is waived under that section.

(c) A partially disabled employee who -

(1) refuses to seek suitable work; or

(2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him;

is not entitled to compensation.

APPENDIX 4

EVIDENCE

§10.110 Affidavit or report by employee of employment and earnings.

The Office may require a partially disabled employee to submit an affidavit or other report as to his or her earnings wither from employment or self-employment. If such individual, when required, fails within a reasonable time to submit such affidavit or report or in]f in such affidavit or report the employee knowingly omits or understates any part of such earnings or remuneration such employee shall forfeit his or her right to compensation with respect to any period for which such affidavit or report was required to be made and any compensation already paid may be recovered by deducting the amount thereof from compensation payable to him or her or from employment referred to in this section or elsewhere in this part means gross earnings or wages before any deductions whatsoever have been taken out of such wages, and include the value of subsistence, quarters, or other advantages received in kind as part of the wage or remuneration. In general, earnings from self-employment means the rate of pay the employee estimates it would cost him or her to have someone else perform the work the employee is performing.

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the forgoing petition were sent to:

Office of the Solicitor General
U.S. Dept. of Justice, Room 5143
10th and Pennsylvania N.W.
Washington, D.C. 20530

Dated: December 29, 1989

William C. Austin